

1 RANDOLPH L. HOWARD, ESQ.  
2 Nevada Bar No. 006688  
3 BART K. LARSEN, ESQ.  
4 Nevada Bar No. 008538  
5 E. DANIEL KIDD, ESQ.  
6 Nevada Bar No. 010106  
7 **KOLESAR & LEATHAM, CHTD.**  
8 3320 W. Sahara Avenue, Suite 380  
9 Las Vegas, Nevada 89102  
10 Telephone: (702) 362-7800  
11 Facsimile: (702) 362-9472  
12 E-Mail: [rhoward@klnevada.com](mailto:rhoward@klnevada.com)  
[blarsen@klnevada.com](mailto:blarsen@klnevada.com)  
[dkidd@klnevada.com](mailto:dkidd@klnevada.com)

13 Attorneys for  
14 **CITY NATIONAL BANK, N.A.**

15 **UNITED STATES BANKRUPTCY COURT**  
16 **DISTRICT OF NEVADA**

17 \* \* \*

18 In re:  
19 TWAIN CONDOMINIUMS, LLC,  
20 Debtor.  
21

22 Case No. 10-33323-lbr  
23 Chapter 11 Case

24 **CITY NATIONAL BANK, N.A.'S OBJECTION TO DEBTOR'S EMERGENCY**  
25 **MOTION FOR ENTRY OF AN INTERIM ORDER PURSUANT TO BANKRUPTCY**  
26 **RULE 4001(b) AND LR 4001(b): (1) PRELIMINARILY DETERMINING EXTENT OF**  
27 **CASH COLLATERAL AND AUTHORIZING INTERIM USE OF CASH COLLATERAL**  
28 **BY DEBTOR; AND (2) SCHEDULING A FINAL HEARING TO DETERMINE**  
**EXTENT OF CASH COLLATERAL AND AUTHORIZING**  
**USE OF CASH COLLATERAL BY DEBTOR**

29 City National Bank, N.A. (the “Bank”), by and through its undersigned attorneys, hereby  
30 submits for the Court’s consideration this Objection to Debtor’s Emergency Motion for Entry of  
31 an Interim Order pursuant to Bankruptcy Rule 4001(b) and LR 4001(b): (1) Preliminarily  
32 Determining Extent of Cash Collateral and Authorizing Interim Use of Case Collateral by  
33 Debtor; and (2) Scheduling a Final Hearing to Determine Extend of Cash Collateral and  
34 Authorizing Use of Cash Collateral by Debtor (the “Emergency Motion”).

35 This Objection is made and based upon the attached Points and Authorities, the

36 **KOLESAR & LEATHAM, CHTD.**  
37 3320 West Sahara Avenue, Suite 380  
38 Las Vegas, Nevada 89102  
39 Tel: (702) 362-7800 / Fax: (702) 362-9472

1 Declaration of Belynda Newman (the “Newman Declaration”), the Declaration of Lori J. Nelson  
 2 (the “Nelson Declaration”), the Declaration of David Wright (the “Wright Declaration”) and the  
 3 Declaration of Bart K. Larsen, Esq. (the “Larsen Declaration) filed in support hereof and all  
 4 Exhibits attached to said Declarations.

5 **POINTS AND AUTHORITIES**

6 **I. INTRODUCTION**

7 Having filed its chapter 11 petition on the eve of the foreclosure sale of its only asset and  
 8 sole source of income, Debtor Twain Condominiums, LLC (“Debtor”) now seeks an emergency  
 9 order determining the extent of the Bank’s cash collateral as defined in Section 363(a) of the  
 10 Bankruptcy Code<sup>1</sup> (“Cash Collateral”) and authorizing Debtor’s use Cash Collateral to fund  
 11 ongoing operational expenses. The Bank gravely doubts Debtor’s ability to successfully  
 12 reorganize its financial affairs given the depressed and deteriorating state of the Southern Nevada  
 13 real estate market and the severely impaired value of the Property<sup>2</sup>, which by Debtor’s own  
 14 admission continues to fall.<sup>3</sup>

15 The most recent appraisal of the Property estimates its value to be only \$6,860,000 as of  
 16 October 4, 2010<sup>4</sup>, which is *over \$4,000,000 less* than the undisputed principal balance Debtor  
 17 owes to the Bank. Consequently, the Bank is opposed to allowing Debtor to fund ongoing  
 18 operating expenses using the rental proceeds from the Property in which the Bank holds a  
 19 perfected, first-position security interest unless adequate measures are put in place to protect the  
 20 value of the Bank’s collateral. Any order allowing interim use of the Bank’s Cash Collateral  
 21 must be conditioned upon (i) the restriction of Debtor’s operating expenditures to recent historic  
 22 levels, (ii) Debtor’s strict adherence to the previously agreed-upon monthly net operating income  
 23 reporting requirements described herein, (iii) Debtor’s continued monthly payment of all net

24  
 25 <sup>1</sup> 11 U.S.C. 101, *et seq.*

26 <sup>2</sup> Capitalized terms not defined herein shall have the same meanings as those ascribed to such terms in the  
 27 Emergency Motion.

28 <sup>3</sup> See Larsen Declaration, Exhibit A, p. 73.

<sup>4</sup> See Nelson Declaration, Exhibit A.

1 operating proceeds to the Bank as previously agreed, and (iv) the implementation of additional  
2 measures as needed to provide adequate protection to the Bank to guard against the near  
3 certainty that the value the Property will continue to deteriorate as the Southern Nevada remains  
4 mired in the depths of the most severe economic recession since the Great Depression, which has  
5 already caused the value of the Property to fall by over 43% since December 2006.

6 The Bank further objects to the Emergency Motion to the extent that it seeks a  
7 determination that Debtor's cash and cash equivalents as of the Petition Date do not constitute  
8 Cash Collateral or that the Bank's security interest in Debtor's cash and cash equivalents was  
9 unperfected as of the Petition Date. Debtor's only known source of income is the rents received  
10 from the Property. Such rents constitute proceeds of the Property, which secures Debtor's  
11 indebtedness to the Bank. Accordingly, those proceeds must remain Cash Collateral.

12 Finally, the Bank expressly reserves all rights relating to Debtor's use of Cash Collateral,  
13 including the right to raise additional objections to the Debtor's request for the entry of a final  
14 order authorizing the use or determining the extent of Cash Collateral.

## 15 II. BACKGROUND

16 1. Debtor entered into an 18-month Construction Loan Agreement (the "Loan  
17 Agreement"), Note (the "Note") and Construction Deed of Trust, Assignment of Rents, Security  
18 Agreement and Fixture Filing (the "Deed of Trust") (collectively, the "Loan" or "Loan  
19 Documents") on or about April 27, 2006.<sup>5</sup>

20 2. Under the Loan Documents, the Bank agreed to loan \$20,370,000 to Debtor,  
21 which Debtor agreed to use to acquire and renovate the 254-unit Twain Estates apartment  
22 complex located at 3651 Arville Street, Las Vegas, Nevada 89103 (the "Property") with the  
23 intent to market and sell the individual units within the Property as condominiums. Debtor  
24 granted the Bank a first-position security interest in the Property and other assets of the Debtor as  
25 described in the Loan Documents.<sup>6</sup>

26  
27 <sup>5</sup> Newman Declaration, ¶ 2. The Loan Agreement, Note and Deed of Trust are attached to the Newman Declaration  
as Exhibits A, B and C, respectively.

28 <sup>6</sup> *Id.*, ¶ 3.

1           3. The Bank's security interest in the Property was perfected through the recording  
 2 of the Deed of Trust in the office of the Clark County Recorder on April 28, 2006.<sup>7</sup> The Bank's  
 3 security interest in Debtor's personal property was perfected through the filing of a UCC  
 4 Financing Statement with the office of the Secretary of State of the State of Nevada.<sup>8</sup>

5           4. Not long after Debtor began its ill-fated attempt to convert the Property to  
 6 condominiums, the Southern Nevada real estate market collapsed as part of a larger national  
 7 recession.

8           5. When the Loan matured on November 1, 2007, Debtor had not completed the  
 9 conversion of the Property to condominiums and was unable to repay the indebtedness owed to  
 10 the Bank under the Loan Documents as originally agreed.<sup>9</sup>

11           6. Debtor and the Bank subsequently entered into a series of agreements to amend  
 12 the Loan Documents to, among other things, repeatedly extend the maturity date of the Loan.<sup>10</sup>  
 13 Notwithstanding these extensions, Debtor ceased its efforts to market the Property as  
 14 condominiums in or around September 2008 after selling just 62 of the 254 units. Since that  
 15 time, Debtor has attempted to return the remaining 192 units to their original intended use as  
 16 apartments.

17           7. On or about March 25, 2009, the Bank and Debtor entered into a final agreement  
 18 to amend the Loan Documents and to extend the maturity date of the Loan. This agreement was  
 19 documented through a Loan Revision Agreement and an Amendment to Construction Loan  
 20 Agreement, which extended the maturity date of the Loan through April 1, 2012.<sup>11</sup>

21           8. In addition to extending the maturity date of the Loan, the March 25, 2009 Loan  
 22 Revision Agreement reduced the principal balance due on the Loan to \$11,404,234 and required  
 23 Debtor to make a principal reduction payment in the amount of \$450,000. As a result, the unpaid

---

24  
 25           <sup>7</sup> *Id.*, Exhibit C.

26           <sup>8</sup> *Id.*, ¶ 4; Exhibit T.

27           <sup>9</sup> *Id.*, ¶ 5.

28           <sup>10</sup> *Id.*, ¶ 6 – 14; Exhibits D – K.

<sup>11</sup> *Id.*, ¶ 15; Exhibits L – M.

1 principal balance Debtor owed to the Bank was reduced to \$10,954,234 as of March 25, 2009.<sup>12</sup>

2       9.       The March 25, 2009 amendments to the Loan Documents also established various  
 3 reporting and payment procedures that required Debtor to submit monthly reports to the Bank  
 4 documenting its net operating income and to pay all net operating proceeds to the Bank to be  
 5 applied to accrued interest and to reduce the indebtedness owed under the Loan Documents.  
 6 Specifically, the March 25, 2009 Amendment to Construction Loan Agreement states:

7       Section 10.9.4 is hereby deleted and replaced in its entirety to read as follows:

8       **“Net Operating Income Reporting.** Within fifteen (15) days after the end of each  
 9 month, commencing March 30, 2009, Borrower shall deliver to Lender statements of Net  
 10 Operating Income (the “NOI”) (as defined below) showing any excess funds over the  
 11 monthly NOI, if any (the “Net Proceeds”). Net Proceeds shall be paid into CNB  
 12 operating account no. 112-571566 within the earlier of: (i) five (5) days notice from  
 13 CNB, or (ii) ten (10) days after the Net Operating Income reporting date. With such Net  
 14 Proceeds applied to the Loan, and Note No. 170670-71319 provided in Paragraph 10.11.  
 15 Borrower agrees no NOI distributions will be allowed to the Guarantor, Borrower’s  
 16 members, or any related parties of the Guarantor or Borrower’s members. The first  
 17 principal payment shall be due in May 1, 2009, and will include the previous months’  
 18 reporting of Net Proceeds.

19       “Net Operating Income” shall mean, for any relevant period, the Revenues minus the  
 20 Expenses. “Revenues” shall mean any income associates with the Project including but  
 21 not limited to income from the following: rents, vending machines, non-refundable  
 22 deposits, deposit forfeitures, replacement charges, cleaning fees, late charges, NSF  
 23 charges, HOA assessments and other miscellaneous items. “Expenses” shall mean all  
 24 costs and expenses related to the Property based on the most recent appraisal in file.  
 25 Operating Expenses from Management can not exceed 4.0% of total Revenues, and  
 26 Operating Expenses for Salaries and Payroll can not exceed a combined total of \$175,000  
 27 per year.”<sup>13</sup>

28       10.      Notwithstanding the clear requirements set forth above that Debtor report its Net  
 1 Operating Income and pay all Net Proceeds to the Bank on a monthly basis, Debtor has  
 2 consistently failed to honor this agreement.<sup>14</sup> As a result, the Bank provided various notices of  
 3 default to Debtor concerning these and other breaches of the Loan Documents on December 8,  
 4 2009, September 23, 2010 and November 8, 2010.<sup>15</sup>

25       <sup>12</sup> *Id.*, ¶ 16.

26       <sup>13</sup> *Id.*, ¶ 24, Exhibit M, § 2.

27       <sup>14</sup> *Id.*, ¶ 25.

28       <sup>15</sup> Copies of the December 8, 2009, September 23, 2010 and November 8, 2010 notices of default are attached to the  
 1 Newman Declaration as Exhibits R, Q and P, respectively.

1           11. Debtor's compliance with the reporting and payment requirements agreed to  
 2 under the March 25, 2009 amendments to the Loan Documents has been inconsistent at best.<sup>16</sup>  
 3 The most recent financial statement provided to the Bank by Debtor is dated October 11, 2010.<sup>17</sup>

4           12. The agreement to amend the Loan Documents in March 2009 also included the  
 5 implementation of a remargining provision into the Loan Agreement to allow the Bank to protect  
 6 its security interest in the Property as it was returned to use as apartments by requiring that  
 7 Debtor maintain a maximum loan to value ("LTV") ratio of no more than 90% (the  
 8 "Remargining Provision"). Specifically, the Amendment to Construction Loan Agreement set  
 9 forth the following:

10           Section 11 of the Loan Agreement is hereby amended and restated in its entirety to read  
 11 as follows:

12           **"APPRAISALS.** Borrower acknowledges CNB's right to obtain a new appraisal or  
 13 update an existing appraisal of the Project at any time while the Loan or any portion  
 14 thereof remains outstanding (i) when, in CNB's reasonable judgment, such an appraisal is  
 15 warranted as a result of CNB's internal evaluation of the loan (at a minimum, a re-  
 16 appraisal will be required twelve (12) months from the date of value cited in the original  
 17 appraisal report), and/or (ii) to comply with statutes, rules, regulations or directives of  
 18 governmental agencies having jurisdiction over CNB. Further, Borrower hereby agrees  
 19 to pay, upon demand, all appraisers' fees and related expenses incurred by CNB from  
 20 time to time in obtaining appraisal reports. If such new appraisal indicates that the ratio  
 21 ("LTV Ratio") of the outstanding principal balance of the Loan plus any remaining  
 22 undisbursed Loan funds to the then fair market value of the Property (as determined by  
 23 such appraisal) exceeds 90% LTV Ratio or less, upon CNB's demand, Borrower shall  
 24 pay to CNB, as a principal reduction of the Loan, such amount as is necessary to reduce  
 25 the LTV Ratio to 90% or less. Notwithstanding the foregoing, if, as a result of any such  
 26 reappraisal by CNB, CNB makes demand on Borrower to pay down the principal balance  
 27 of the Loan so that the LTV Ratio will be 90% LTV Ratio or less and Borrower fails to  
 28 do so, such failure shall constitute an Event of Default (as hereinafter defined) hereunder  
 and CNB shall have the right to exercise all of its rights and remedies under the Loan  
 Documents as a result of such Event of Default."<sup>18</sup>

29           13. As stated above, the Remargining Provision required that the Bank obtain a new  
 30 appraisal of the Property within twelve (12) months of the date of the then-most-recent appraisal,  
 31

32           

---

<sup>16</sup> Newman Declaration, ¶ 26.

33           <sup>17</sup> A copy of the October 11, 2010 financial statement is attached to the Newman Declaration as Exhibit S.

34           <sup>18</sup> *Id.*, ¶ 17; Exhibit M, § 8.

1 which was dated December 24, 2008<sup>19</sup>, for the purpose of re-evaluating the LTV ratio of the  
 2 Loan.<sup>20</sup>

3       14. In accordance with the Loan Documents, the Bank obtained a new Summary  
 4 Appraisal Report in December 2009<sup>21</sup> that estimated the market value of the Property at that time  
 5 to be \$10,200,000. This Summary Appraisal Report further established that the ratio of the  
 6 outstanding principal loan balance (\$10,954,234) to the fair market value of the Property  
 7 (\$10,200,000) to be approximately 107.4%, which far exceeded the maximum allowable LTV  
 8 ratio of 90%.<sup>22</sup>

9       15. Based on the December 2009 valuation of the Property, the Bank demanded that  
 10 Debtor tender a principal reduction payment in the amount of \$1,774,234 in order to re-establish  
 11 the maximum allowed LTV ratio of 90% or less. The Bank issued this remargining notice to  
 12 Debtor on January 8, 2010 requiring tender of the principal reduction payment within 30 days.<sup>23</sup>

13       16. Debtor subsequently refused to pay any principal reduction payment. As a result,  
 14 the Bank issued a notice of default to Debtor on February 9, 2010.<sup>24</sup>

15       17. Rather than comply with the remargining notice or attempt to cure its default,  
 16 Debtor objected to the Bank's Summary Appraisal Report dated December 21, 2009 and  
 17 subsequently obtained its own independent appraisal of the Property. Debtor's Narrative  
 18 Appraisal, Summary Report<sup>25</sup> estimated the market value of the Property to be \$11,750,000 as of  
 19 March 3, 2010 and projected that the value of the Property would continue to decline at the rate  
 20 of 2% per month during 2010.<sup>26</sup>

21  
 22<sup>19</sup> A copy of the December 24, 2008 appraisal is attached to the Wright Declaration as Exhibit A.

23<sup>20</sup> Newman Declaration, ¶ 18.

24<sup>21</sup> A copy of the December 21, 2009 Summary Appraisal Report is attached to the Wright Declaration as Exhibit B.

25<sup>22</sup> Newman Declaration, ¶ 19.

26<sup>23</sup> *Id.*, ¶ 20; Exhibit N.

27<sup>24</sup> *Id.*, ¶ 21; Exhibit O.

28<sup>25</sup> A copy of Debtor's Narrative Appraisal, Summary Report dated March 3, 2010 is attached to the Larsen Declaration as Exhibit A.

<sup>26</sup> Larsen Declaration, Exhibit A, p. 73.

1       18. Even if Debtor's appraisal of the Property was accepted as accurate as of March  
 2 3, 2010, the ratio of the undisputed outstanding principal loan balance (\$10,954,238) to Debtor's  
 3 valuation (\$11,750,000) still exceeded the maximum permitted LTV ratio of 90%. Thus, by  
 4 Debtor's own admission, the Bank was entitled to a principal reduction payment of at least  
 5 \$379,234.08<sup>27</sup>, which Debtor refused to pay.

6       19. The total amount of principal, accrued interest, late charges and penalties owed by  
 7 Debtor to the Bank stood at \$11,620,305 as of November 24, 2010.<sup>28</sup>

8       20. Given Debtor's persistent refusal to tender any principal reduction payment even  
 9 as the value of the Property continued to fall, the Bank chose to exercise its rights under the Loan  
 10 Documents to foreclose upon its security interest in the Property.

11       21. In furtherance of the Bank's efforts to foreclose, a trustee's sale of the Property  
 12 was scheduled to take place on December 1, 2010 and later continued to December 16, 2010.  
 13 Debtor filed its chapter 11 petition on December 15, 2010 just hours before the scheduled  
 14 trustee's sale.

15       **III. LEGAL ARGUMENT**

16       **A. There Is No Dispute that Debtor's Post-Petition Apartment Rental Income Is  
 17 Cash Collateral.**

18       Cash Collateral "includes the proceeds, products, offspring, rents, or profits of property  
 19 ... as provided in section 552(b) of this title." 11 U.S.C. § 363(a). "Section 552(b) is an  
 20 exception to bankruptcy's rule, found in Section 552(a), that after-acquired clauses in security  
 21 agreements are not given effect in bankruptcy even though authorized by Article 9 of the UCC."  
 22 *In re Las Vegas Monorail Co.*, 429 B.R. 317, 327 (Bankr. D. Nev. 2010). Section 552(b) states  
 23 in part that:

24       [I]f the debtor and an entity entered into a security agreement before the commencement

25       <sup>27</sup> The LTV ratio as of March 3, 2010 using Debtor's appraisal is calculated as follows:

26        $(\$10,954,234 \text{ Loan Balance}) / (\$11,750,000 \text{ fair market value}) = 93.23\%$

27       A principal reduction payment in the amount of \$379,234 would result in an LTV ratio of 90% if the fair market  
 28 value of the property is deemed to be \$11,750,000.

28       <sup>28</sup> Larsen Declaration, Exhibit A, ¶ 2.

1 of the case and if the security interest created by such security agreement extends to  
 2 property of the debtor acquired before the commencement of the case and to proceeds,  
 3 products, offspring, or profits of such property, then such security interest extends to such  
 4 proceeds, products, offspring, or profits acquired by the estate after the commencement  
 of the case to the extent provided by such security agreement and by applicable  
 nonbankruptcy law ...

5 11 U.S.C. § 552(b). “This exception allows lenders to follow their legitimate interest in  
 6 transmuted forms of their collateral; a security interest in a receivable generated prepetition is not  
 7 lost in bankruptcy simply because it was paid in cash after filing.” *In re Las Vegas Monorail*  
 8 Co., 429 B.R. at 327. “Roughly speaking, this section parallels the similar protections under  
 9 state law afforded by UCC § 9-315, protections which are automatically provided to every  
 10 secured creditor without the need to request it.” *Id.* (citation omitted).

11 Notwithstanding Debtor’s request that the Court determine the extent of the Cash  
 12 Collateral, Debtor concedes the foregoing and acknowledges that, pursuant to Section 552(b), the  
 13 Bank “retains its security interest in the Debtor’s cash proceeds that are identifiable and traceable  
 14 directly from the Debtor’s rental revenues generated after the Petition Date.”<sup>29</sup> Accordingly,  
 15 there appears to be no dispute that Debtor’s post-petition rental income is Cash Collateral.

16 **B. The Bank’s Security Interest in Debtor’s Cash and Cash Equivalents, Which  
 17 Are Traceable Proceeds of the Property, Was Perfected as of the Petition Date.**

18 Citing NRS § 104.9312(2), Debtor incorrectly argues in the Emergency Motion that the  
 19 Bank’s security interest in Debtor’s on-hand cash and cash equivalents remains unperfected due  
 20 to the fact that such assets were not in the Bank’s possession or control as of the Petition Date.  
 21 While the statute cited by Debtor may require, in some circumstances, possession or control of  
 22 deposit accounts and cash in order to perfect a security interest in such property, Debtor ignores  
 23 the fact that most if not all of the cash and cash equivalents in Debtor’s possession as of the  
 24 Petition Date are traceable cash proceeds of the Property. As such, NRS § 104.9312(2) does not  
 25 apply. Instead, the perfection of the Bank’s security interest in such proceeds is governed by  
 26 NRS § 104.9315, which provides in part:  
 27

28 

---

 <sup>29</sup> Emergency Motion, p. 3, ll. 6-8.

1           3. A security interest in proceeds is a perfected security interest if the security interest in  
 2           the original collateral was perfected.

3           4. A perfected security interest in proceeds becomes unperfected on the 21st day after the  
 4           security interest attaches to the proceeds unless:

5           (a) The following conditions are satisfied:

6           (1) A filed financing statement covers the original collateral;  
 7           (2) The proceeds are collateral in which a security interest may be  
 8           perfected by filing in the office in which the financing statement has been  
 9           filed; and

10           (3) The proceeds are not acquired with cash proceeds;

11           (b) The proceeds are identifiable cash proceeds; or

12           (c) The security interest in the proceeds is perfected when the security interest  
 13           attaches to the proceeds or within 20 days thereafter.

14           NRS 104.9315 (3) and (4).

15           As explained in comment 7 to the corresponding § 9-315 of the Uniform Commercial  
 16           Code, “if the security interest in the original collateral was perfected, a security interest in  
 17           identifiable cash proceeds will remain perfected indefinitely, regardless of whether the security  
 18           interest in the original collateral remains perfected.” In this case, there should be no doubt that  
 19           Debtor’s security interest in the Property and the proceeds thereof was properly perfected  
 20           through the recording of the Deed of Trust and the filing of the Bank’s UCC Financing  
 21           Statement. As such, the Bank’s security interest in the cash proceeds of the Property was  
 22           automatically perfected and remains perfected indefinitely.

23           Although Debtor has not yet filed any schedules or its statement of financial affairs, the  
 24           only significant known source of revenue to Debtor is the rents and other income it derives from  
 25           the Property.<sup>30</sup> Debtor has not provided any accounting or paid any portion of the November or  
 26           December 2010 rents it collected to the Bank as required under the Loan Documents. As set  
 27           forth in the October 2010 financial statement provided to the Bank, Debtor expected to collect  
 28           rents totaling \$237,782 in November and December 2010.<sup>31</sup> Moreover, Debtor’s October

29  
 30 See Declaration of Roni Amid [Docket No. 7] (the “Amid Declaration”), ¶ 19 (“Debtor’s revenue is derived  
 31 primarily from apartment rental income.”).

32 See Newman Declaration, Exhibit S.

1 financial statement projected Debtor's net operating proceeds for the months of November and  
 2 December 2010 to total \$110,537.<sup>32</sup> Debtor has paid no portion of its November or December  
 3 net proceeds to the Bank. Yet, as of the Petition Date, Debtor claims to have had only \$10,963  
 4 in cash on hand.<sup>33</sup>

5 Under the Loan Documents, Debtor is required to pay all net operating proceeds to the  
 6 Bank to pay accrued interest and to reduce the indebtedness owed under the Loan Documents.  
 7 Having failed to make such payments, Debtor should be required to immediately and fully  
 8 account for its November and December 2010 rent income as a condition of any order allowing  
 9 use of Cash Collateral for future operating expenses.

10 **C. Debtor Cannot Meet Its Burden of Demonstrating that Adequate Protection  
 11 Exists.**

12 A chapter 11 debtor's use of Cash Collateral is governed by Section 363 of the  
 13 Bankruptcy Code. A debtor may not use cash collateral unless either "(A) each entity that has an  
 14 interest in such cash collateral consents; or (B) the court, after notice and a hearing, authorizes  
 15 such use, sale, or lease ..." 11 U.S.C. § 363(c)(2). "Indeed, unless a debtor in possession  
 16 obtains consent or a court order, it 'shall segregate and account for any cash collateral in the  
 17 trustee's possession, custody, or control.'" *In re Las Vegas Monorail Co.*, 429 B.R. at 326 (citing  
 18 11 U.S.C. § 363(c)(4)).

19 To the extent that a debtor's use of Cash Collateral "results in a decrease in the value of  
 20 [the secured creditor's] interest in such property," adequate protection must be provided in one  
 21 of the forms identified in Section 361 of the Bankruptcy Code that "will result in the realization  
 22 by [the secured party] of the indubitable equivalent of such entity's interest in such property."  
 23 *Id.* (citing 11 U.S.C. §§ 361(1)(2) and 363(3)). "The general purpose of adequate protection is to  
 24 ensure that the secured creditor ultimately receives what it would have had not bankruptcy  
 25 intervened." *Id.*

26 <sup>32</sup> See *Id.* Also, Debtor's proposed budget projects monthly rental income of \$110,000 and operating costs of  
 27 \$55,000 to \$70,000, leaving projected net operating proceeds of \$40,000 to \$50,000 per month. See Amid  
 Declaration, Exhibit 1.

28 <sup>33</sup> Amid Declaration, ¶ 20.

1           Debtor bears the burden of establishing that the Bank's security interest in the Cash  
 2 Collateral is adequately protected. *See* 11 U.S.C. 363(p). Given the significantly impaired and  
 3 declining value of the Property as evidenced by a series of three appraisals obtained by the Bank  
 4 over the past 24 months, Debtor cannot meet this burden. There is absolutely no rational or  
 5 factual basis for Debtor's assertion that the value of the Bank's collateral exceeds the  
 6 indebtedness owed under the Loan Documents.<sup>34</sup> Debtor has provided no appraisal or other  
 7 credible evidence to support its contention that the Bank's interest in the Cash Collateral is  
 8 adequately protected. The Bank, on the other hand, has offered three own appraisals of the  
 9 Property dated December 21, 2008, December 24, 2009 and October 11, 2010 that show the  
 10 value of the Property declining by over 43% from \$12,200,000 to less than \$6,900,000 over the  
 11 past 24 months, which equates to an average monthly decline of approximately 2.4% per month  
 12 over this period.

13           Debtor's own appraisal of the Property dated March 3, 2010, which Debtor declined to  
 14 offer in support of the Emergency Motion, estimated the value of the property to be \$11,750,000  
 15 and projected that the value of the Property would continue to fall at the rate of 2% per month  
 16 during 2010.<sup>35</sup> If Debtor's own appraisal and projections are accepted as accurate, the Property  
 17 would currently be worth no more than \$9,796,536<sup>36</sup>, which is far less than the undisputed  
 18 principal balance Debtor owes under the Loan Documents of \$10,954,234. If the value of the  
 19 Property continues to decline at the rate of 2% per month in the future, the Bank stands to lose  
 20 well over \$100,000 per month in collateral protection during each month that the trustee's sale of  
 21 the Property is delayed.

22           Given the vastly under-secured status of the Loan, the continuing decline in the market  
 23 value of the Property and the unexplained absence of the November and December 2010 rents  
 24 collected by Debtor, which remain Cash Collateral, the Court should not enter any order

25           <sup>34</sup> *See* Amid Declaration, ¶ 25.

26           <sup>35</sup> *See* Larsen Declaration, Exhibit B, p. 73.

27           <sup>36</sup> A 2% per month decline in Debtor's \$11,750,000 valuation of the Property from March 3, 2010 through  
 28 December 3, 2010 would leave the current value at approximately \$9,796,536. The decline over this nine-month  
 period is calculated as follows: \$11,750,000 x (1 - .02)<sup>9</sup> = \$9,796,546.

1 allowing Debtor to use Cash Collateral to fund future business operations unless the Bank's  
 2 security interests are adequately protected. At a minimum, any order allowing use of cash  
 3 collateral should be conditioned upon (i) the Debtor providing a full and accurate accounting of  
 4 the November and December 2010 rent proceeds, (ii) the restriction of Debtor's future operating  
 5 expenditures to recent historic levels as established pursuant to Debtor's previous financial  
 6 reports to the Bank<sup>37</sup>, (iii) Debtor's strict adherence to the monthly Net Operating Income  
 7 reporting requirement implemented under the March 25, 2009 amendments to the Loan  
 8 Documents<sup>38</sup>, (iv) Debtor's continued monthly payment of all Net Proceeds to the Bank as  
 9 previously agreed pursuant to the March 25, 2009 amendments to the Loan Documents and (v)  
 10 the implementation of such additional measures as needed to provide adequate protection to the  
 11 Bank.

12 **IV. CONCLUSION**

13 WHEREFORE, the Bank respectfully requests that any order allowing interim use of  
 14 Cash Collateral by Debtor to fund ongoing operations be condition upon terms consistent with  
 15 those set forth in this Objection.

16 DATED this 22nd day of December, 2010.

17 **KOLESAR & LEATHAM, CHTD.**

18 /s/ Bart K. Larsen, Esq.  
 19 RANDOLPH L. HOWARD, ESQ.  
 20 Nevada Bar No. 006688  
 21 BART K. LARSEN, ESQ.  
 22 Nevada Bar No. 008538  
 23 E. DANIEL KIDD, ESQ.  
 24 Nevada Bar No. 00010106  
 25 3320 W. Sahara Avenue, Suite 380  
 26 Las Vegas, Nevada 89102  
 27 Telephone: (702) 362-7800  
 28 Facsimile: (702) 362-9472  
 29 E-Mail: [rhoward@klnevada.com](mailto:rhoward@klnevada.com)  
[blarsen@klnevada.com](mailto:blarsen@klnevada.com)  
[dkidd@klnevada.com](mailto:dkidd@klnevada.com)

30 Attorneys for  
 31 CITY NATIONAL BANK, N.A.

32  
 33 <sup>37</sup> See Newman Declaration, Exhibit S.

34  
 35 <sup>38</sup> *Id.*, Exhibit M, § 2.